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No. 94-853

In The

Supreme Court of the United States

October Term, 1994

ROBERT S. CAPUTO,

Petitioner,

v.

COMPUCHEM LABORATORIES, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

MURRAY S. LEVIN
Attorney I.D. No. 12928
Counsel of Record
SARAH E. RICKS
Attorney I.D. No. 60421
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
Philadelphia, PA 19103-2799
(215) 981-4000

Attorneys for Respondent
Compuchem Laboratories, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF THE QUESTION PRESENTED

Whether, under Pennsylvania law, a laboratory hired by an employer to perform drug screening tests on a urine sample from a prospective employee has satisfied any duty of care owed to the prospective employee and is not subject to liability for defamation where the laboratory has properly handled the sample, carefully performed the requested tests and accurately reported the results to the employer?

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OPINIONS AND JUDGMENTS BELOW

The unpublished judgment order of the United States court of appeals for the Third Circuit affirming the district court's grant of summary judgment for respondent CompuChem Laboratories, Inc. is available at 1994 U.S. App. Lexis 27995 (3d Cir. August 17, 1994) and is reproduced in the appendix attached to the petition (J.A. 2a-3a). The opinion of the United States district court for the Eastern District of Pennsylvania is reported at 9 I.E.R. Cas. (BNA) 546 (E.D.Pa. 1994), is available at 1994 U.S.

Dist. Lexis 2191 (E.D.Pa. Feb. 23, 1994) and is reproduced in the appendix attached to the petition (J.A. 4a-20a).

COUNTERSTATEMENT OF THE CASE

Petitioner Robert S. Caputo sued CompuChem Laboratories, Inc. ("CompuChem")[1] for negligence and defamation based on a drug screening analysis performed by CompuChem on a sample of Mr. Caputo's urine. The court of appeals for the Third Circuit affirmed without opinion the district court's grant of summary judgment against Mr. Caputo's claims that CompuChem performed the test negligently and that CompuChem defamed him by reporting the positive drug test result to petitioner's former employer, Air Products and Chemicals, Inc. ("Air Products").

In February, 1992, Mr. Caputo applied for a position with Air Products and, as part of the application process, consented to a pre-employment drug screening test. (J.A. 5a). Mr. Caputo provided the sample in Pennsylvania, where it was sealed and sent to CompuChem, located in North Carolina. *Id.* CompuChem used widely accepted procedures to perform three separate tests on the Caputo sample: an initial drug screening test using the Enzyme Multiplied Immunoassay Technique ("EMIT") method; a

[1] CompuChem Laboratories, Inc. is an affiliate of Hoffmann-La Roche Inc., whose parent corporation, Roche Holdings, Inc., holds a majority interest. The ultimate parent, Roche Holding Ltd., is publicly traded on the Zurich Stock Exchange. Roche Holding Ltd. is also the ultimate parent of Genentech, Inc., which is publicly traded in the United States.

more precise Gas Chromatography/Mass Spectrometry ("GC/MS") test to confirm the initial positive result; and a re-confirmation test using the GC/MS method to reconfirm the positive result. The results of the three separate urine analyses performed by CompuChem are consistent with each other and with an independent test subsequently performed on the same sample. (J.A. 7a, n.1). The Caputo urine sample consistently tested positive for an opiate, morphine.

In April, 1992, CompuChem reported the results of the tests to their client Air Products. The report listed the drugs for which Mr. Caputo's urine was screened, the cutoff levels used to determine a positive reading and the results for each drug, including the one for which the urine tested positive, morphine. (J.A. 10a-11a). As the district court found, the report stated simply that the urine tested positive for morphine: "the report transmitted by the defendant reflects nothing more than the obvious statement that the indisputably accurate number obtained from the test for morphine when compared to the baseline used by the laboratory showed a level of metabolite for morphine which exceeded the cutoff level for a positive result." (J.A. 18a).[2]

The district court found as an "unchallenged fact that the report from defendant laboratory was absolutely accurate." (J.A. 16a). The court found that "[s]ince the

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[2] At Air Products' request, CompuChem performed a reconfirmation GC/MS test and on April 16, 1992 again reported to Air Products that Mr. Caputo's urine tested positive for morphine.

number found in plaintiff's sample exceeded the minimum baseline value established and used by the laboratory for reporting test results as negative, the report necessarily indicated that plaintiff's test was positive for the presence of morphine." (J.A. 11a).

On or about April 13, 1992, Mr. Caputo reported for work at Air Products and was told that the position was no longer available to him because his urine had not passed the drug screening test. Shortly thereafter, he resumed his previous employment.

The positive results of the three CompuChem drug screening tests were confirmed by an independent laboratory chosen by Mr. Caputo. After initiating this litigation, Mr. Caputo requested that his original sample be retested by SmithKline Beecham Laboratories. As the district court found, SmithKline "confirmed the results of the CompuChem tests." (J.A. 7a, n.1).

Mr. Caputo's expert, Richard S. Marchese, stated in his report that the cut-off for a positive reading for morphine was 300 ng/ml and that the Caputo sample analyzed by CompuChem had a "morphine concentration of 400-500 ng/ml." Petition at 5; *see also* J.A. 19a (district court noted widespread acceptance of baseline for positive morphine reading used by CompuChem). Since the reading for the Caputo sample was in excess of 300 ng/ml, the positive cut-off level acknowledged by Mr. Caputo's expert, the district court found "the inescapable conclusion that the comparison of the two numbers indicates a positive result." (J.A. 17a). The facts of record are undisputed that the original Caputo sample tested positive for morphine.

REASONS FOR DENYING THE PETITION

Petition for certiorari should be denied in this case because no federal issue is presented for review. Contrary to petitioner's claim, there is no conflict among the circuits because both the decision of the court of appeals for the Third Circuit in this case and the decision of the court of appeals for the Fifth Circuit in *Willis v. Roche Biomedical Laboratories, Inc.*, 21 F.3d 1368 (5th Cir. 1994) are based on state law, the law of Pennsylvania and Texas, respectively.

Rule 15.1 of the Rules of the Supreme Court of the United States provides that, in addition to arguments for denial of the petition, a brief in opposition to a petition for certiorari should address "misstatements of fact or law" set forth in the petition. In his petition, Mr. Caputo repeatedly mischaracterizes the record in this case.

A. Certiorari Should Not Be Granted Because There Is No Conflict Among The Federal Circuit Courts Of Appeals.

Mr. Caputo asserts that certiorari should be granted because "a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal court of appeals on the same matter. . . . " Petition for Writ of Certiorari at 7; *see* Rule 10.1(a). Mr. Caputo claims that the decision of the court of appeals for the Third Circuit in this case is in conflict with the decision of the Fifth Circuit in *Willis*.

Mr. Caputo is wrong. The decisions of the Third Circuit and the Fifth Circuit are not in conflict because they do not apply the same law. In both cases, the legal

disputes are determined by state law. In this case, the district court applied Pennsylvania state law of negligence and defamation and the court of appeals for the Third Circuit affirmed for the reasons stated by the district court. (J.A. 15a-16a; 2a-3a); Petition at 10-11 (admitting dispute governed by Pennsylvania law). The district court held that, under Pennsylvania law, when a laboratory contracts with an employer to perform drug screening tests of potential employees, the duty owed by the laboratory to the potential employee, if any, is fulfilled by accurately performing those chemical tests requested by the employer and by accurately reporting the results to medical personnel located at the employer. (J.A. 15a-16a; 17a-18a). The district court held that Mr. Caputo's defamation claim failed under Pennsylvania law because the CompuChem report was "absolutely accurate." (J.A. 16a).

In *Willis*, however, the court of appeals for the Fifth Circuit applied the law of Texas. *See Willis*, 21 F.3d at 1370 (holding district court "appropriately applied Texas law"). In *Willis*, an employee of a company brought negligence and other state claims against a laboratory hired by the company to analyze urine samples after the laboratory admitted that it had erroneously reported the employee's urine positive for methamphetamines. *Id.* at 1369-70. The court of appeals reversed the district court's grant of summary judgment against the employee because, "under current Texas law," 21 F.3d at 1375, the laboratory's admission of its mistake in the analysis of the urine sample meant that the record "contain[ed] evidence from which a jury could reasonably conclude that

[the lab] was negligent in the manner in which it administered the generally reliable GC/MS drug testing technology relative to Willis's urine sample, and that such negligent application of this test technology proximately caused injury to Willis." *Id.* at 1376.

While the two decisions of the courts of appeals for the Third and Fifth Circuit differ, the difference is attributable to the differences between Pennsylvania and Texas law and to the differing fact patterns of the two cases. No federal issue is implicated by the divergence of Pennsylvania tort law from Texas tort law and certiorari should not be granted to consider such a false conflict. "As to questions controlled by state law . . . conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life*, 304 U.S. 202, 206 (1938); *see also Wolf v. Weinstein*, 372 U.S. 633, 636 (1963) (dismissing writ as improvidently granted where the controversy "primarily implicates questions of Pennsylvania state law and presents no federal question of substance"); *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."). The ability of states to develop their laws independently of one another is a core value of our federalist system. The supervisory authority of this Court properly is invoked to promote uniformity of the federal courts' application of federal law; here, Mr. Caputo's petition for review should be denied because there is no need for uniformity in the federal courts'

application of the laws of different states. *Cf. Griffin v. McCoach*, 313 U.S. 498, 503 (1941) (certiorari granted in diversity case where conflict among the circuits existed on the federal issue of whether a federal court was required to apply the conflict of laws rules of the state where it sits).

B. Petitioner's Misstatements Of The Record Mischaracterize The Issues Which Would Be Before The Court Were Certiorari Granted.

Petitioner's brief is rife with misstatements of the record. For example, CompuChem made no "flagrant reporting errors." Petition at 8. On the contrary, the district court found as an "unchallenged fact that the report from the defendant laboratory was absolutely accurate." (J.A. 16a); *see* J.A. 18a-19a ("the indisputably accurate number obtained from the test for morphine when compared to the baseline used by the laboratory showed a level of metabolite for morphine which exceeded the cutoff level for a positive result"). Petitioner does not dispute the district court's finding that the established cutoff for a positive reading for morphine is 300 ng/ml, *see* J.A. 19a, and that the Caputo sample tested by CompuChem had a "morphine concentration of 400-500 ng/ml," which obviously is higher than the positive cutoff. Petition at 5, 19 (quoting Mr. Caputo's expert report). By conceding these facts alone, Mr. Caputo has conceded the propriety of the district court's finding that the CompuChem test result – positive for morphine – was "absolutely accurate." (J.A. 16a).

Petitioner claims that CompuChem should not have reported the Caputo result as "positive" because the levels of morphine discovered in the Caputo sample are consistent with ingestion of poppy seeds. Contrary to Mr. Caputo's claims, the record shows that this case does not concern a "false positive" test result, *see* Petition at 6, 18, 26, nor does it involve poppy seeds. *Id.* at 6, 19-21, 28.

While it may be true that the ingestion of poppy seeds can cause the presence of morphine in urine, the record contains no evidence that Mr. Caputo ingested poppy seeds prior to providing the urine sample analyzed by CompuChem. Mr. Caputo's expert's ruminations on the possible effects of poppy seeds therefore are irrelevant to this lawsuit. Moreover, it is undisputed that poppy seeds do not cause "false positive" drug test results. Mr. Caputo's own expert states that it is "widely known" that ingestion of poppy seeds "can produce morphine" in urine because poppy seeds contain "predominantly morphine." Petition at 19-20. A laboratory test for morphine detects morphine no matter why it is present. Urine which contains more than the positive cutoff level for morphine has in fact tested positive for morphine and should be so reported. Mr. Caputo has never denied that his urine sample had a higher concentration of morphine than the positive cutoff level of 300 ng/ml. No matter what the source of the morphine in Mr. Caputo's urine, CompuChem was obligated to report the result as positive.

Most importantly, in an apparent attempt to create a federal issue where there is none, petitioner has improperly relied on certain federal guidelines governing the conduct of a Medical Review Officer ("MRO"), defined in

the guidelines as a licensed physician who interprets the results of laboratory tests performed for federal workplace drug testing programs. Mr. Caputo has distorted the content of the federal guidelines, misstated his own expert's interpretation of the guidelines and failed to provide any evidence that federal regulations of any kind applied to CompuChem's testing of the urine sample provided by Mr. Caputo.

Mr. Caputo has cited no evidence to support his claim that the district court erred in determining that this case is not subject to any federal guidelines. *See* Petition at 8; J.A. 13a (Mr. Caputo "has not established" applicability of federal regulations); J.A. 15a, n.2 ("there appears to be no support whatsoever for the proposition that the cited federal regulations apply"). Nevertheless, the text of the Guidelines upon which Mr. Caputo relies[3] is useful to illustrate that petitioner has confused the role of a laboratory with that of an MRO.

The text of the Guidelines reveal that the role of the laboratory is to answer the question "are drugs present in the urine?" If the test is positive, the role of the Medical Review Officer is to answer the question why drugs are present in the urine. Under the Guidelines, the Medical

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[3] Under "Federal Provisions Involved," petitioner has listed "The Medical Review Officer's Guide to Drug Testing, Crouch, MBA, Caplan Yale; ___ CFR ___." Petition at 2-3. Mr. Caputo apparently refers to the United States Department of Health and Human Services rules which explain how a Medical Review Officer is to evaluate urine drug tests performed in federal workplaces. *See* Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11979, 11985-986 at §§ 2.7 (a-d).

Review Officer is responsible for "verifying" a confirmed positive test result, meaning the MRO must determine whether a positive drug test of an individual's urine is attributable to drug use by that individual:

> (a) Medical Review Officer Shall Review Results. An essential part of the drug testing program is the final review of results. A positive test result does not automatically identify an employee/applicant as an illegal drug user. An individual with a detailed knowledge of possible alternate medical explanations is essential to the review of results. This review shall be performed by the Medical Review Officer . . .
>
> (b) . . . The Medical Review Officer shall be a licensed physician with knowledge of substance abuse disorders and may be an agency or contract employee. *The role of the Medical Review Officer is to review and interpret positive test results* . . . The Medical Review Officer *shall examine alternate medical explanations for any positive test result* [which may include an interview of the person and review of his or her medical history or other relevant biomedical information].

53 Fed. Reg. 11985 §§ 2.7(a-b) ("Reporting and Review of Results") (emphasis added). The laboratory's function is limited to the scientific task of determining whether a urine sample contains drugs; the MRO decides how to interpret and act on a laboratory positive result.

Mr. Caputo claims that CompuChem Laboratories should not have reported the Caputo sample as positive for morphine without first "verifying" the results by performing an additional test called 6-MAM. *See e.g.*, Petition

at 8, 14-15, 20-21, 21-23, 27. On the contrary, the record shows that the 6-MAM test was not required. Petitioner's claim rests on his misinterpretation of his own expert's report, his unsupported assertion that federal guidelines apply and his misstatement of the role of a laboratory as opposed to an MRO.

Petitioner has confused a "laboratory-positive" result with a "verified positive" result. Mr. Caputo's expert states that CompuChem did not perform a 6-MAM test and that certain unspecified federal guidelines:

> allow the Medical Records [sic] Officer (MRO) to verify the [laboratory-positive] result as positive only if 6-MAM is detected or if the MRO finds clinical evidence in addition to the urine test.

Petition at 20 (quoting expert report). Mr. Caputo's expert does not state that a laboratory *must* perform a 6-MAM test to reach a laboratory-positive result for morphine nor does he claim that a laboratory's omission of a 6-MAM test is evidence of negligence. Rather, the expert states that, under certain federal regulations, the detection of 6-MAM is an alternative way for a Medical Review Officer to verify a laboratory-positive urine test. *Id.* As CompuChem is a laboratory and not a "Medical Review Officer," petitioner's expert's views on what an MRO is and is not permitted to do are not relevant to this litigation. *See* J.A. 13a (district court finding that even if federal rules applied, "the verification of positive test results as described by plaintiff's expert is to be accomplished by [an MRO], not by a testing laboratory").

Mr. Caputo's claim that CompuChem should have performed the 6-MAM test is unsupported by his own

expert's report or any other evidence of record. CompuChem's customer did not request the 6-MAM test and Mr. Caputo has not pointed to any evidence to contradict the district court's finding that performance of the 6-MAM test was not otherwise required. As the district court found, there is

> no justification in the factual record or in the law for plaintiff's position that liability for either negligence or defamation can or should be imposed upon [CompuChem] for accurately reporting a 'lab positive' drug test without assuring that it was a 'verified positive' result, *i.e.*, that the testing laboratory should have fulfilled the function of a Medical Review Officer . . . or should have . . . suggest[ed] to its client that the more sophisticated 6-MAM test ought to have been performed or . . . perform[ed] such test on its own initiative.

J.A. 15a-16a.

In addition to petitioner's above misstatements of the factual record, Mr. Caputo has failed to set forth any evidence that CompuChem knew for what purpose petitioner's employer would use the results of the drug test. Petition at 4. Nor has Mr. Caputo identified any evidence to support his claim that CompuChem "failed to establish an appropriate baseline number for morphine." Petition at 27. On the contrary, the district court found "no evidence to suggest that the baseline value used by the laboratory was inappropriate" and that Mr. Caputo's own expert relied on the same number (300 ng/ml) to distinguish a positive from a negative test result. (J.A. 19a).

CONCLUSION

Mr. Caputo's petition for certiorari should be denied. The decision of the court of appeals for the Third Circuit in this case and the decision of the court of appeals for the Fifth Circuit in *Willis* are not in conflict because the decisions applied the laws of Pennsylvania and Texas, respectively, and no federal issue is presented for review.

Respectfully submitted,

MURRAY S. LEVIN
Attorney I.D. No. 12928
Counsel of Record
SARAH E. RICKS
Attorney I.D. No. 60421
PEPPER, HAMILTON & SCHEETZ
3000 Two Logan Square
Philadelphia, PA 19103-2799
(215) 981-4000

Attorneys for Respondent
CompuChem Laboratories, Inc.